

D R A F T**PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Consumer Protection and Safety Division
Electric Generation Performance Branch

San Francisco, California
Date: August 24 2006
Resolution EGPB-1

RESOLUTION

**RESOLUTION GRANTING APPROVAL OF THE
FINAL REPORT ON THE AUDIT OF THE AES
HUNTINGTON BEACH POWER PLANT
PERFORMED BY THE ELECTRIC GENERATION
PERFORMANCE BRANCH OF THE CONSUMER
PROTECTION AND SAFETY DIVISION, AND
AUTHORIZING PUBLIC DISCLOSURE OF THE
FINAL AUDIT REPORT**

SUMMARY

This Resolution grants the request of the Consumer Protection and Safety Division (“CPSD” or “staff”) for approval of the Electric Generation Performance Branch’s (EGPB) Final Report on the Audit of the AES Huntington Beach Power Plant (“AESHB” or “the Plant”) dated March 31, 2006, (“Final Audit Report”). This Resolution also authorizes disclosure of the Final Audit Report.

BACKGROUND

General Order 167, “Enforcement of Maintenance and Operation Standards for Electric Generating Facilities” (effective September 2, 2005) sets forth maintenance, operation, and logbook standards for electric generating facilities in California (referred to as “Generating Asset Owners” or “GAOs” in the General Order.) General Order 167 was adopted in response to legislation enacted by the California Legislature in 2002, codified in Public Utilities Code 761.3, which requires the Commission to “implement and enforce standards ... for the maintenance and operation of facilities for the generation of electric energy” in California. Section 11.1 of General Order 167 notifies GAOs subject

to the General Order that regular and systematic audits will be conducted in order to ensure compliance with General Order 167.¹

The AESHB audit is the first of the audits conducted by CPSD for compliance with General Order 167. Going forward, CPSD intends to perform approximately two to four audits per year. The Final Audit Report is the result of an iterative process between staff and the plant, including the review of data requests, a one-week on-site, issuance of the preliminary audit report, review and receipt of the plant's response and Corrective Action Plan, a meet and confer period, and the issuance of a semi-final report reflecting corrective actions (if any) taken by the plant. CPSD intends to issue a final and public version of all the final audit reports at the conclusion of each of the plant audits, detailing its findings and recommendations, and requesting Commission approval.

Section 15.4 of General Order 167 allows GAOs to request confidential treatment of information by indicating the specific law or statutory privilege prohibiting disclosure. AESHB requested that the Final Audit Report and related materials be treated confidentially by letter on August 22, 2005. CPSD staff agreed to treat the audit materials confidentially, until such time as the full Commission authorizes public disclosure.

DISCUSSION

1. Final Audit Report Findings and Recommendations

Starting in August 2004, the CSPD audit team visited AES Huntington Beach, L.L.C. power plant to determine compliance with logbook standards and maintenance standards in General Order 167. The methods used to conduct the audit included:

- Review of plant performance,
- Preparation of detailed data requests,
- A site from October 18 through 22, 2004; including
- Discussions with plant management,
- Reviews of procedures and records,
- Observations of operations and maintenance activities,
- Interview with rank and file employees, and
- Inspections of equipment and infrastructure.

¹ See also, D.04-05-018, pp. 15-16; additional detail on audit procedures is found in the "Maintenance Standards for Generators with Suggested Implementation and Enforcement Model, Section 3, Verification and Audit Process", Appendix C to D.04-05-018.

The audit focused on standards for safety, training, recordkeeping, and preventive and predictive maintenance, including care of tools, spare parts and plant chemistry. A full description of the audit, including the procedure, findings, recommendations and conclusions is contained in the Final Audit Report attached as Appendix A to the Final Resolution.²

CPSD's Preliminary Audit Report, which was provided to AESHB on January 12, 2005, identified potential violations of the Maintenance Standards, and recommended corrective actions be taken by the plant. On February 24, 2005, AESHB submitted a Corrective Action Plan to CPSD in response to the Preliminary Audit Report. CPSD and AESHB next held a meet-and-confer meeting on April 14, 2005. On August 3, 2005, CPSD auditors held a final conference call to discuss the draft Final Audit Report with AESHB. CPSD subsequently revised the draft Final Audit Report based on additional information provided during the conference call.

The Final Audit Report details staff's preliminary findings and recommendations, the corrective actions taken by the Plant to date, and includes the final outcome and needed follow-up action recommended by CPSD staff. In some instances, CPSD has requested that AESHB provide CPSD with quarterly progress reports in order to monitor the plant's activities; in others, CPSD has requested notification of completion of certain corrective actions proposed by the Plant.

The results of CPSD's audit indicate that the continued implementation of the proposed corrective actions will adequately address all of the findings in the Final Audit Report. CPSD found no need for formal enforcement action based on the audit findings. CPSD does, however, request that the Commission order AESHB to (1) complete implementation of the 18 corrective actions (a) through (r); (2) continue to provide quarterly progress reports on items (a) through (c); and (3) notify CPSD of the completion of items (a) through (d); all of these items are listed in the section of the Final Audit Report entitled "Executive Summary and Audit Conclusions."

We hereby grant CPSD's request for approval of the Final Audit Report. CPSD's General Order 167 audits provide a comprehensive assessment of the Plant's efforts to comply with General Order 167. Our approval of the findings and recommendations in the final audit reports will give CPSD's recommendations the force of law, assuring that generators implement the corrective action measures identified in the final audit report and provide progress or status reports as requested by CPSD.

² The Public Version of the Draft Resolution does not include Appendix A, as the Final Report is subject to a pending request for confidential treatment under section 15.4 of General Order 167. Appendix A is attached to the Confidential/Non-Public Version of the Draft Resolution, and will be attached to the Final Resolution if disclosure is authorized and the Final Report approved by the Commission.

2. Public Disclosure of the Final Audit Report

By correspondence dated August 12, 2005, AESHB requested that the Draft Final Audit Report, AESHB's response, and the Final Audit Report ("Audit Materials") not be disclosed to the public.³ As required by General Order 167, section 15.4.1, AESHB's request sets forth the legal reasons supporting its claim of confidentiality, which we discuss further, below.

CPSD responded to AESHB's confidentiality request on August 22, 2005.⁴

CSPD staff agreed to treat the Audit Materials as provisionally confidential, noting that staff's agreement is not a final determination of the confidentiality of the Audit Materials and is not binding on the Commission. CPSD also stated in its response that it intended to ultimately seek a Commission resolution authorizing disclosure of the Audit Materials once the audit report was finalized. CPSD seeks only to make the Final Audit Report public by this Resolution, and not the draft report or related materials. We now consider AESHB's confidentiality request.

a) Relationship of General Order 66-C and General Order 167.

First, AESHB argues that under General Order 66-C, "records of investigations and *audits*" are not open to public inspection, "except to the extent disclosed at a hearing or by formal Commission action." (General Order 66-C, § 2.2(a).) Since the Audit Materials are records of an audit under General Order 66-C, these documents should not be publicly disclosed unless and until the Commission takes formal action to make all or a portion of the Audit Materials public.

As AESHB acknowledges, General Order 66-C provides only an initial bar to public access. It does not limit our ability to order the release of the Audit Materials, even if excluded from the definition of public records in General Order 66-C. The Commission can authorize disclosure of such records through formal action, such as this Resolution.

We take this opportunity to address the relationship between General Order 66-C and General Order 167. We do not believe that General Order 167 is contrary to General Order 66-C. However, Section 15.4 of General Order 167 departs from General Order

³ The letter from Brian T. Cragg, Goodin, Macbride, Squeri, Ritchie & Day, Counsel for AESHB to Randy Wu, General Counsel, Legal Division, CPUC dated August 12, 2005, requested confidential treatment of the "draft (preliminary) Final Audit Report, AESHB's response to the draft Final Audit Report, and the Final Audit Report." A subsequent letter dated August 22, 2005, requested confidential treatment of AESHB's response to CPSD's October 24, 2005 data request related to the HB audit.

⁴ Letter from Charlyn Hook, Staff Counsel for CPSD, to Brian T. Cragg, dated August 22, 2005.

66-C by placing the burden of proof on the GAO to establish the legal basis for confidentiality treatment. (General Order 167, § 15.4.1). In addition, General Order 167:

- Contains minimum requirements for establishing a confidentiality claim in section 15.4.3, and directs GAOs asserting a privilege or exemption involving a balancing of interests for and against disclosure to demonstrate why the public interest in an open process is clearly outweighed by the need to keep the material confidential (§ 15.4.2);
- Reminds utility-owned GAOs that Public Utilities Code section 583 does not create a privilege or designate any specific types of documents as confidential (§ 15.4.2), and
- Limits the duration of confidentiality claims to two years. (§ 15.4.4).

We believe the specific requirements in General Order 167, in addition to putting the burden on the GAO to justify its request, supersede the presumption of confidentiality for audit records in General Order 66-C.

We note that there has been a shift in Commission policy since General Order 66-C was adopted in the 1970's, whereby we have moved away from broad presumptions of confidentiality. For example, in D.06-01-047, we observed that Commission's "treatment of records disclosure has been evolving towards a policy that favors even more public disclosure."⁵ Further, the 2004 amendments to the California Constitution, which implicitly incorporated the principles of the Public Records Act (Gov't Code § 6250 et seq.), requires public agencies to broadly construe statutes and other authorities furthering public access, and to narrowly construe authority which limits the people's right to access. (Cal. Const., art. 1, § 3(b)(1)-(2).). This constitutional emphasis on governmental openness mirrors our own policy favoring increasing disclosure and transparency in decisionmaking, in the absence of a compelling and legally sound basis for keeping information from the public.

Most recently, in D.06-06-066, we observed that "in view of SB 1488's concerns about openness, GO 66-C may require revision."⁶ Like General Order 167, section 15.4, D.05-06-066 starts with the presumption that information should be publicly disclosed, and the

⁵D.06-01-047 (January 26, 2006) Order Modifying and Denying Rehearing of Decisions 04-05-017 and 04-05-018 (*Rulemaking to Implement the Provisions of Public Utilities Code § 761.3*), the proceeding which adopted General Order 167) p. 38.

⁶ D.06-06-066 (June 29, 2006) Interim Opinion Implementing Senate Bill No. 1488, Relating to Confidentiality of Electric Procurement Data Submitted to the Commission, p. 21, citing D.05-04-030.

proponent of non-disclosure has the burden of proving that the information is confidential, or that it fits within a pre-designated class of confidential information contained in a matrix established in the proceeding.)⁷

b) Official Information Privilege - (Evidence Code § 1040)

Second, AESHB asserts that the official information privilege, Evidence Code § 1040, protects “information acquired in confidence by a public employee in the course of his or her duty” if “there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.” AESHB acknowledges the public’s general right to information about Commission activities, but asserts that improved operation and maintenance practices and higher availability of plants resulting from the candid exchange of information together outweigh the public benefit in access to the Audit Materials.

AESHB’s argument can be summarized as follows: The Commission and the public are better served by the free and candid exchange of information, that can best occur in an environment where the plant need not worry about the possibility that the press or media will misconstrue, distort or sensationalize the very technical aspects of plant operations and maintenance. AESHB concludes that “The prospect that public disclosure and resulting misperceptions” will inhibit this frank and candid exchange, both in CPSD’s observations and in the plant’s response, resulting in a “chilling effect on these communications.”

We do not find this argument persuasive. AESHB is essentially maintaining that it will be more forthcoming in providing information to CPSD if it can be assured that the public will not have access to this information. This strikes us as contrary to the spirit and intent of the California Constitution and the Public Records Act, and not the type of “public benefit” the Commission wishes to endorse. The Commission has previously rejected similar arguments by utilities that the threat of public scorn might have a “chilling effect” on the substance and candor of information provided to the Commission, in particular, where there is a legal obligation to provide complete and accurate information, as there is here. (See, *Re San Diego Gas and Electric Company* [D.93-05-020] (1993) 49 CPUC 2d 241, 243.)

Article I, Section 3 of the California Constitution provides that “the people have the right of access to information concerning the conduct of the people’s business” and requires the “writings of public officials and agencies shall be open to public scrutiny.” (Cal. Const., art. 1, § 3(b)(1).) Moreover, decisions of public agencies that would limit the

⁷ D.06-06-066, pp. 2-3, 22-23; see also Appendix A, containing categories of presumptively confidential information.

public's right of access require us to make specific findings "demonstrating the interest protected by the limitation and the need for protecting that interest," and that any such limitation be narrowly construed. (Cal. Const., art. 1, § 3(b)(2).)

Similarly, the Public Records Act mandates that the public be given access to "information concerning the conduct of the people's business." (Gov't Code § 6250.) CPSD's General Order 167 audits are conducted to ensure compliance with General Order 167, which the Commission adopted to "implement and enforce standards for the maintenance and operation of electric generating facilities and power plants so as to maintain and protect the public health and safety of California residents and businesses, to ensure that electric generating facilities are effectively and appropriately maintained and efficiently operated, and to ensure electrical service reliability and adequacy." (General Order 167, § 1.0.) The Public Records Act requires that the public be given access to government records unless they fall within an express exemption, or the public interest in nondisclosure *clearly outweighs* the public interest in disclosure. (Gov't Code § 6255 (emphasis added).)

AESHB has not provided a compelling reason to withhold the Final Audit Report from the public. To the contrary, important public interests may well be served by disclosure of General Order 167 audit reports. These include the public's right to know that generating facilities providing the electric service it relies on are operated in conformance with regulatory requirements. In addition, the release of audit reports will increase awareness of safety issues and best practices within the generating community. Allowing public access to audit reports will provide an incentive to GAOs to maintain their plants in top condition, which may lead to increased reliability. Moreover, in enacting Public Utilities Code 761.3, the Legislature found that "electric generating facilities and powerplants in California are essential ... [to protect] the public health and safety of California residents and businesses," and that it is in the public interest to ensure that they are "appropriately maintained and efficiently operated."⁸

We conclude that AESHB has not met its burden of demonstrating that the public interest in nondisclosure clearly outweighs the public interest in disclosure of the Final Audit Report. Future audit reports conducted under General Order 167 will also be subject to public disclosure, unless it can be demonstrated that under the specific circumstances, the public interest in nondisclosure clearly outweighs the public interest in disclosure.

⁸ SB 39XX, Ch. 19, Section 1, approved April 25, 2002; filed April 25, 2002.

3. Trade Secret Privilege (Evidence Code § 1060 and Civil Code § 3426.1)

Third, AESHB asserts that the Trade Secret privilege (Evid. Code § 1060 and Civ. Code § 3426.1), protects certain information related to the plant's expected retirement date and chemical cleaning of boiler tubes.

The Trade Secret privilege extends to information that (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy, and (3) application of the privilege "will not tend to conceal fraud or otherwise work an injustice." (Civ. Code § 3426.1(d); Evid. Code § 1060.) These requirements are also set forth in General Order 167, section 15.4.3.4.

AESBH argues that the plant's retirement date and chemical cleaning plans derives "independent economic value from not being generally known to the public, and could be used by competitors and potential purchasers of generation to distort competitive markets." AESHB asserts that it has maintained the confidentiality of this information, but does not explain why the allowance of the privilege will not otherwise conceal fraud or work an injustice.

As we stated in D.06-01-047, we are aware of the need to protect trade secrets and sensitive commercial information which we receive from GAOs pursuant to our authority in General Order 167.⁹ We acknowledge that there are certain aspects of plant maintenance and operations which, if publicly disclosed, may be advantageous to competitors. We anticipate that this could be the case with respect to the timing of plant closures, either for planned maintenance, or possibly longer periods of time. However, we need not reach this issue today. The Final Audit Report merely references that chemical cleaning is a possibility that will be considered by the plant sometime in 2006. We think this reference is not specific enough to constitute a Trade Secret. In addition, the Final Audit Report no longer makes reference to any plans for closure of the plant. Thus, this argument has been mooted by revisions to the Final Audit Report.

In light of our discussion above, the Final Audit Report should be made public. We will determine future requests for confidentiality of Trade Secret or commercially sensitive information on a case by case basis. In the future, CPSD, working with interested GAOs, may designate certain categories of information as "presumptively confidential," adopting a process similar to that proposed in R.05-06-040, where confidential categories

⁹ General Order 167 relies in part, on the Commission's authority derived from state law and 16 U.S.C. § 824(g). Section 824(g) authorizes State commissions to obtain books, accounts and records from wholesale generators, and requires State commissions not to publicly disclose trade secrets or sensitive commercial information.

of information have been determined, and an expedited procedure for determining confidentiality requests has been established. This may be done in a later proceeding, or by intervening in Phase II of R.05-06-040.

PROTESTS

CPSD's Preliminary Audit Report was provided to AESHB on January 12, 2005. The Preliminary Audit Report identified possible violations of the Maintenance Standards, and recommended corrective actions be taken by the plant. On February 24, 2005, AESHB submitted a Corrective Action Plan to CPSD in response to the Preliminary Audit Report.

CPSD and AESHB held a meet-and-confer meeting on April 14, 2005. On August 3, 2005, CPSD auditors held final courtesy conference call to discuss the draft Final Audit Report with AESHB. CPSD subsequently revised the draft Final Audit Report based on additional information provided during the meet and confer and conference call.

COMMENTS

The Draft Resolution of the Legal Division in this matter was mailed to the parties in interest on July 24, 2006, in accordance with Public Utilities Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed by _____ on _____.

FINDINGS OF FACT

1. General Order 167, "Enforcement of Maintenance and Operation Standards for Electric Generating Facilities" (effective September 2, 2005) sets forth maintenance, operation, and logbook standards for electric generating facilities in California. Section 11.1 of General Order 167 notifies GAOs subject to the General Order that regular and systematic audits will be conducted in order to ensure compliance with General Order 167.

2. The Final Audit Report is the result of an iterative process between staff and the plant, including the review of data requests, a one-week on-site audit, issuance of the preliminary audit report, review and receipt of the plant's response and Corrective Action Plan, a meet and confer period, and the issuance of a semi-final report reflecting corrective actions (if any) taken by the plant.

3. As part of the audit process, the CPSD audit team visited AES Huntington Beach, L.L.C. power plant from October 18, 2004 through October 22, 2004, to determine compliance with logbook standards and maintenance standards in General Order 167.

4. CPSD intends to issue a final and public version of all the final audit reports at the conclusion of each of the plant audits, detailing its findings and recommendations, and requesting Commission approval.

5. Section 15.4 of General Order 167 allows GAOs to request confidential treatment of information by indicating the specific law or statutory privilege prohibiting disclosure. AESHB requested that the Final Audit Report and related materials be treated confidentially by letter on August 22, 2005. CPSD staff agreed to treat the audit materials confidentially, until such time as the full Commission authorizes public disclosure by letter of August 22, 2005.

6. CPSD's General Order 167 audits provide a comprehensive evaluation of the Plant's efforts to comply with General Order 167.

7. The results of CPSD's audit indicate that the continued implementation of the proposed corrective actions will adequately address all of the findings in the Preliminary Audit Report. There is no need for formal enforcement action based on the audit findings at this time.

CONCLUSIONS OF LAW

1. Our approval of the findings and recommendations in the final audit reports will give CPSD's recommendations the force of law, assuring that generators implement the corrective action measures identified in the Final Audit Report and provide progress or status reports as requested by CPSD.

2. General Order 66-C provides only an initial bar to public access. It does not limit our ability to order the release of the Audit Materials, even if excluded from the definition of public records in General Order 66-C.

3. General Order 167, section 15.4.1, places the burden of proof on the GAO to establish the legal basis for confidentiality treatment.

4. The specific requirements in General Order 167, in addition to putting the burden on the GAO to justify its request, supersede the presumption of confidentiality for audit records in General Order 66-C.

5. There has been a shift in the Commission's policy since General Order 66-C was adopted in the 1970's, moving away from broad presumptions of confidentiality. The Commission's treatment of records disclosure has evolved toward a policy that favors even more public disclosure.

6. Article I, section 3 of the California Constitution provides that "the people have the right of access to information concerning the conduct of the people's business" and requires the "writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. 1, § 3(b)(1).) Decisions of public agencies limiting the

public's right of access require us to make specific findings "demonstrating the interest protected by the limitation and the need for protecting that interest," and that any such limitation be narrowly construed. (Cal Const., art. 1, § 3(b)(2).)

7. The Public Records Act mandates that the public be given access to "information concerning the conduct of the people's business." (Gov't Code § 6250.) CPSPD's General Order 167 audits are conducted to ensure compliance with General Order 167, which the Commission adopted to "implement and enforce standards for the maintenance and operation of electric generating facilities and power plants so as to maintain and protect the public health and safety of California residents and businesses, to ensure that electric generating facilities are effectively and appropriately maintained and efficiently operated, and to ensure electrical service reliability and adequacy." (General Order 167, § 1.0.) The PRA requires that the public be given access to government records unless they fall within an express exemption, or the public interest in nondisclosure clearly outweighs the public interest in disclosure. (Gov't Code § 6255.)

8. AESHB has not provided a compelling reason to withhold the Final Audit Report from the public. To the contrary, important public interests are served by disclosure of General Order 167 audit reports.

9. The Trade Secret privilege extends to information that (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy, and (3) application of the privilege "will not tend to conceal fraud or otherwise work an injustice." (Civ. Code § 3426.1(d); Evid. Code 1060.)

10. The Final Audit Report should be made available to the public.

ORDER

1. The Consumer Protection and Safety Division's request for disclosure of the "Final Report on the Audit of the Huntington Beach Power Plant," dated March 31, 2006, is granted.

2. AESHB is ordered to (1) complete implementation of the 18 corrective actions (a) through (r); (2) continue to provide quarterly progress reports on items (a) through (c); and (3) notify CPSPD of the completion of items (a) through (d); as specified in the Final Audit Report section entitled "Executive Summary and Audit Conclusions."

3. This Resolution is effective today.

I certify that this resolution was adopted by the Public Utilities Commission at its regular meeting held on August 24, 2006. The following Commissioners voting favorably thereon:

STEVE LARSON
Executive Director